Supreme Court, U. S.
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No. 78-1945

In the

Supreme Court of the United States

OCTOBER TERM, 1979

UNIVERSITIES RESEARCH ASSOCIATION, INC.,
Petitioner,

v.

STANLEY E. COUTU, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD AND KADJAN
11 South LaSalle Street
Chicago, Illinois 60603
(312) 236-0415
Counsel of record for Service

ROBERT JAY NYE
NYE AND NYE
420 North Euclid Avenue
Oak Park, Illinois 60302
(312) 386-7373

Attorneys for Respondent Stanley E. Coutu, and the Respondent Class.

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED FOR REVIEW

1. Whether a government contractor which performs Davis-Bacon Act (40 U.S.C. §§276a-276a-7) "construction, alteration and/or repair" work with its own employees is required to pay those employees the minimum wage rates published in the Federal Register which the Act requires for that work, and is the statutory requirement for payment of those wage rates incorporated in its government contract by operation of law and by reference, when the contract specifies that:

(a) the contractor is responsible for "construction, alteration and/or repair" concerning the public buildings and public works on the government project,

(b) the contractor will include Davis-Bacon Act wage stipulations in subcontracts letting portions of the contract work to others, and

(c) if the contractor performs Davis-Bacon work with its own employees the contract will be modified to incorporate Davis-Bacon Act stipulations.

2. Whether the Supreme Court will consider the question presented by petitioner concerning existence of an employee private remedy under the Davis-Bacon Act, when:

(a) that question was not raised, briefed, argued or ruled on in the proceedings below which have been brought here for review, and

(b) the record does not therefore include (as it did in *McDaniel* v. *University of Chicago,* 7 Cir. 1975, 512 F.2d 583, vacated and remanded for further consideration 423 U.S. 809 (1975), reaffirmed on remand, 1977, 548 F.2d 689, certiorari denied 434 U.S. 1033 (1978)), evidence or admissions establishing the ineffectiveness of certain express remedies provided in the Act.

3. *If the Supreme Court elects to consider this issue presented by petitioner*: Whether wage-earners have a right of action against their contractor-employer to recover unpaid wages required by the Davis-Bacon Act (40 U.S.C. §§276a-276a-7) and by the government contract provisions required by §276a of the Act, when—because there are no contract amounts withheld sufficient to assure employee payments (*see* 40 U.S.C. §276a-2(a)) nor is there a surety payment bond for the protection of employees (*see* 40 U.S.C. §276a-2(b))—such employee right of action is the only remedy available to make effective the congressional purpose of the Davis-Bacon Act to require contractors to pay their employees the wages required by the Act.

LIST OF PARTIES

The petitioner in this Court is Universities Research Association, Inc. Petitioner is the named defendant in a complaint filed in the district court for the Northern District of Illinois. The respondent in this Court is Stanley E. Coutu, on his own behalf and on behalf of a class which has been certified by the district court. The class as so certified is described as follows:

> "All 'mechanics and/or laborers' employed by defendant pursuant to Contract No. AT(49-8)-3000 between defendant and the United States of America 'for construction, alteration and/or repair, including painting and decorating, of public buildings and public works of the United States' who have been paid wages less than 'the wages • • • determined by the Secretary of Labor to be prevailing for the various classes of laborers and mechanics • • • in the city, town, village, or other civil subdivision of the State' in which the work was performed, all as stated and defined in the Davis-Bacon Act, 40 U.S.C. §276a, *et seq.*"

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A. The "right of action" question was not raised, briefed, argued or ruled on in the proceedings below which have been brought here for review. Should the Supreme Court elect, nevertheless, to consider this question, it must be presumed that the courts below have found and concluded (as in *McDaniel* v. *University of Chicago*, 7 Cir., 512 F.2d 583 and 548 F.2d 689, certiorari denied 434 U.S. 1033) that such employee right of action is the only remedy available to make effective the Congressional purpose to require contractors to pay their employees the wages required by the Act. 39

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BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

1. Certiorari was granted in this cause to review a decision of the Seventh Circuit which reversed a summary judgment entered by the district court and remanded the case for completion of discovery and for trial. The district court description of the motion and affidavit, pursuant to which that summary judgment had been entered, is as follows (See J.A. 31-32, 81):

> "Defendant has filed a motion for summary judgment supported by the affidavit of John R. Frazier, Chief Legal Counsel for the Fermi National Accelerator Laboratory claiming that there is no issue of material fact and Defendant is entitled to judg-

> ment as a matter of law. Defendant asserts that the only contract between defendant and the United States government is Contract No. EY-76-C-2-3000, as amended, formerly designated AT(49-8)-3000, and that '[n]o Davis-Bacon Act, 40 U.S.C. §276, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said contract . . .' [Affidavit of John R. Frazier, para. 3]."

2. An accurate description of the nature of this cause, the government contract in issue, the contentions of the parties, and the conclusions of the court of appeals, is found in the opinion of the Seventh Circuit, *Coutu* v. *Universities Research Association, Inc.*, 595 F.2d 396 (J.A. 35-46). For the convenience of the Court, relevant portions of that opinion are reprinted in the Appendix to this brief, at *Ai*.

3. The government contract pursuant to which respondent and his class were employed manifestly procures and continues today to procure "construction, alteration and repair" of the buildings, facilities and systems at the Fermi National Accelerator Laboratory site owned by our government. Indeed, under the original January 23, 1968 contract and until fourteen modifications and some four years later, the parties had expressly **excluded** "operation, maintenance, and use" from the petitioner's responsibilities. Thus, paragraph "1" of Article XXXVIII of the contract, the last article in the contract, reads (Contract, page 70):

> "The operation, maintenance, and use of the accelerator complex when completed are not within the scope of this contract."

Modification No. 14, dated April 6, 1972, continues the construction responsibilities of the petitioner (see, *e.g.*, Contract, Recitals, Modification No. 14, at 1) and adds—as only part of "Phase II" of the work procured by the contract—certain "operation, use and maintenance" functions. Phase II also added certain "alterations and modifications" and certain "construction of additional new facilities [and] alterations or repair of existing facilities" responsibilities. (Contract, Article II, Modification No. 14, at 8, 10.)

4. Neither petitioner nor the United States as *amicus* has pointed to any governmental ruling or decision characterizing this government contract as not covered by the Davis-Bacon Act. They appear simply to infer the existence of such a ruling from contract provisions which *first* provide that Davis-Bacon Act work under the contract should be subcontracted out by petitioner rather than performed with petitioner's own employees, *second* require that petitioner include in those subcontracts the appropriate Davis-Bacon Act stipulations, and *third* state that if petitioner does use its own employees for Davis-Bacon Act work the contract will be modified to include Davis-Bacon Act clauses so far as petitioner's own workforce is concerned. Those contract provisions, however, are consistent only with conclusions that the contract is covered by the Davis-Bacon Act and that the contracting agency does view it as covered.[1] They both contemplate that Davis-Bacon work is being procured by means of

[1] Further evidence exists, too, establishing that both the petitioner and the agency know that the contract is covered by the Davis-Bacon Act. Discovery, until it was stayed to permit summary judgment proceedings on petitioner's "the contract does not contain express Davis-

the government contract, and require that Davis-Bacon work be subject to contract clauses applicable to that work. Thus, contrary to the contention of the petitioner that the contract "does not specify that [Davis-Bacon prevailing wage] rates be paid" (see "Question Presented", Petr. Brief, at 2), and contrary to the contention of the United States that the contract "has been administratively determined not to call for Davis-Bacon work" (see "Question Presented", *Amicus Brief,* at 1), it is clear that the contract **does** specify that Davis-Bacon wage rates be paid and the contracting agency **has** determined that the contract calls for Davis-Bacon work to which Davis-Bacon obligations are applicable.

5. The petitioner has appended to its contract an "Appendix B" containing certain employee classifications

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[1] (Continued)
Bacon Act stipulations" point, disclosed the existence of approximately 135 forms entitled "Request for Davis-Bacon Determination," dated almost monthly between September 13, 1968 and December 5, 1975. The forms were initially prepared by petitioner, then submitted to AEC/ERDA for the views of the area manager and his three-man "Davis-Bacon Committee," thereafter circulated among the members of the committee, and finally returned to petitioner with a "recommendation" (by the committee) which the area manager "approved" concerning whether or not the Davis-Bacon Act was applicable to the work thus described by petitioner. We do not yet know whether petitioner submitted descriptions of *all* work to be performed under the contract; nor do we yet know how many or which of the forms actually submitted (if any) include work which was performed by the respondent class. Without commenting on the propriety or legal effect of those forms and recommendations, however, there were 129 recommendations that "Davis-Bacon Act *is* applicable" and 6 recommendations that "Davis-Bacon Act is *not* applicable".

and salary and benefit schedules. As the United States has noted (*Amicus Brief*, at 11, n. 11):

> "The hourly rates specified by the contract for contractor employees * * * are somewhat less than the prevailing wages established by the Department of Labor for similar classifications of Davis-Bacon Act workers * * *."

These "Appendix B" classifications and salary schedules do not, under the contract (see, *e.g.*, Contract "Appendix B" at 33; J.A. 61) or under the Davis-Bacon Act, set the upper limit of wages to be paid petitioner's workers. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177-178 (1954). The contracting agency itself does not view petitioner's action in preparing those classifications and schedules and their attachment to the contract as representing binding contracting agency representations that they are proper. See Kennedy Deposition, at 79-82.

6. The issue in the courts below, and that which was initially presented to this Court in petitioner's certiorari petition (see "Question Presented", Petition, at 2), did not question the very existence of a private remedy to respondent and his class for nonpayment of their Davis-Bacon minimum wages. The appeal below was from a summary judgment based simply on the one sentence in petitioner's counsel's affidavit that

> "No Davis-Bacon Act, 40 U.S.C. §276a, *et seq.*, stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in said Contract . . ." (Pet. App. C, at A25; J.A. 31-32, 81).

The first district judge to rule on the sufficiency of the complaint had rejected that same contention when he denied petitioner's prior motion to dismiss the suit. See

Pet. Appendix B, at A15; J.A. 24. The Seventh Circuit, in its decision now under review, likewise rejected that contention, declaring (Pet. App. A, at A5; J.A. 39; 595 F.2d 396, 398):

> "We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law."

The question of the existence of a private remedy was neither briefed nor argued in the Court of Appeals. In fact, that question was treated by petitioner as settled in its brief to the Seventh Circuit (Deft. Brief at 1, 8, 17-18; 7th Cir. Docket No. 78-1165).

After request by this Court that respondent submit a brief in response to the Petition in this cause, our Brief in Opposition was filed. Then Supreme Court Rule 23-1(c) (now Rule 21.1(a)) was quoted and, *inter alia,* respondent and the class pointed out that

> "arguments by petitioner to the effect that respondent has no right of action under or by reason of the Act, and that respondent has failed to exhaust administrative remedies, are not so fairly comprised [in the "Question Presented"] and have already been recently considered by this Court twice in related litigation." (Brief in Opposition, at 26-29.)

The related litigation, there noted, is *McDaniel* v. *University of Chicago,* 512 F.2d 583 (C.A. 7, 1975), vacated and remanded "for further consideration in light of *SIPC* v. *Barbour,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *Cort* v. *Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)", 423 U.S. 809, 96 S.Ct. 20, 46 L.Ed.2d 30 (1975), reaffirmed on remand, 548 F.2d 689 (C.A. 7, 1977), certiorari denied, 434 U.S. 1033, 98 S.Ct.

765, 54 L.Ed.2d 780 (1978). Counsel are the same in both the instant *Coutu* and the *McDaniel* cases, and the University of Chicago is one of the members of petitioner Universities Research Association, Inc.

Certiorari was granted without specific designation by the Court of the issues to be argued. Thereafter petitioner filed its brief on the merits, much of which deals with the question of the existence of a private remedy. See, e.g., Petr. Brief, at 15-21, 28-32, 33. *All* of the brief by the United States as *amicus curiae* deals with that question. See "Question Presented" and "Argument", *Amicus Brief*, at 1, 17.

7. Further, the record in the instant *Coutu* case does not fairly present questions concerning the existence *vel non* of a private remedy on behalf of respondent and his class. *McDaniel* on the contrary did present that record. There the record established, among other things, that no surety payment bonds upon which wage-earners might sue were required of or submitted by the contractor (see *McDaniel* Appendix at 21-22, 7th Cir. Docket No. 73-1438), and that no funds were withheld from the contractor with which to pay those wage-earners (see *Ibid.*, Affidavit at 23-24). We may, of course, speculate in the cause now on review that because of the virtually-identical fact situations presented in both cases, the express statutory remedies here were as ineffective as there. But this Court has never been known for a proclivity to render advisory opinions on questions neither presented nor supported by a record made below. Respondent does not, in this cause, contend that the Davis-Bacon Act contains an alternative private federal remedy for laborers and mechanics who simply choose not to utilize express remedies provided by the Act in situations where those

remedies are effective to afford them the relief intended by Congress. Respondent does submit, however, that if this Court elects to hear and decide questions concerning the existence under the Davis-Bacon Act of a private federal remedy other than on surety payment bonds, fundamental fairness requires that the ineffectiveness of the express statutory remedies otherwise provided in the Davis-Bacon Act be presumed.

SUMMARY OF ARGUMENT

Our respondent employees have performed Davis-Bacon Act work under a Davis-Bacon Act government contract, for which their contractor-employer has paid them less than the published Davis-Bacon Act minimum wage rates. The contract expressly concerns "construction" work, expressly informs petitioner that Davis-Bacon Act duties are applicable to such work, and expressly contemplates that the petitioner pay its own employees in accordance with the Davis-Bacon Act if those employees perform Davis-Bacon work. There is no agency view contrary to the conclusion that this contract concerns Davis-Bacon Act work to which the statutory obligations extend. The Act represents fundamental procurement and socio-economic policies established by Congress. Under applicable legal doctrine and precedents, both the Act and the mandatory government contract clauses prescribed by the Act are part of the contract by operation of law. In addition, references in the contract to the Act, petitioner's experience with applying the Act to its own subcontractors, and petitioner's performance of Davis-Bacon work with its own employees, necessarily imply the incorporation of Davis-Bacon obligations into the contract and oblige petitioner to pay the statutory

wage. The court of appeals correctly concluded that petitioner's mere assertion that the contract contains "no Davis-Bacon Act stipulations" is no basis for a summary judgment in favor of the petitioner-employer.

The question of the existence of an employee right of action to recover unpaid Davis-Bacon Act minimum wages, was not raised, briefed, argued or ruled on in the proceedings below in this cause. In the event the Supreme Court elects to consider this question, the Court must presume a record which reflects—as in the recent related *McDaniel* case, 7 Cir., 512 F.2d 583 (1975), 548 F.2d 689 (1977), certiorari denied 434 U.S. 1033 (1978)—that there are no withheld contract amounts to assure employee payments and no surety payment bond upon which respondents might recover. Our respondents assert, thus, that their right of action exists under circumstances which render other statutory relief unavailable. This employee right of action is the only remedy here available to make effective the Congressional purpose of the Davis-Bacon Act to require contractors to pay their employees the wages required by the Act. Congress created the federal statutory right to these minimum wages and conferred a private right of action on employees under the Act. The Congressional purpose will be undermined in the circumstances of this case absent relief against the contractor-employer by these particular persons intended to be protected by the Act. This remedy is an essential and rational part of and complement to its remedial scheme. There is, finally, no agency—other than our courts—assigned by law to adjudicate respondents' claims and enforce their rights.

ARGUMENT

I.

THE DAVIS-BACON ACT (40 U.S.C. §§276a-276a-7) **REQUIRES PAYMENT TO WAGE-EARNERS OF MINIMUM WAGE RATES CONTAINED IN THE SECRETARY OF LABOR'S PREVAILING WAGE DETERMINATIONS, FOR ALL LABOR CONCERNING "CONSTRUCTION, ALTERATION AND/OR REPAIR INCLUDING PAINTING AND DECORATING, OF PUBLIC BUILDINGS OR PUBLIC WORKS OF THE UNITED STATES"** (see 40 U.S.C. §276a). **THIS STATUTORY REQUIREMENT PREVAILS ALTHOUGH THE CONTRACTOR-EMPLOYER'S GOVERNMENT CONTRACT MAY FAIL TO CONTAIN AN EXPRESS STIPULATION BY THE CONTRACTOR-EMPLOYER TO PAY THE STATUTORY WAGE RATES FOR SUCH WORK.**

A. The Davis-Bacon Act exists to protect employees from substandard earnings by fixing a floor under wages on Government projects. Our respondent class of laborers and mechanics are the "especial" beneficiaries of the Act.

1. The Government contract requires Davis-Bacon work. The Government contract involved in this case clearly contemplates, by its express terms, the performance of construction work within the meaning of the Davis-Bacon Act (40 U.S.C. §§276a-276a-7). Among other provisions, it characterizes the "two categories of work contemplated by this contract" (Contract No. AT(49-8-3000, Appendix "A" thereof) for which petitioner is responsible, as

> "a. Construction: Includes design, fabrication or procurement, erection, test and inspection, assembly

> and installation of the systems, components, buildings, etc., comprising the accelerator and the conventional facilities, as described * * * below.
>
> "b. Research and Development: * * *" [Appendix "A" to Contract, at p. 1.].

Further, by Supplemental Agreement dated April 6, 1972 "effective as of July 1, 1971" the contract was revised, certain prefatory Recitals stating, *inter alia,* that "the Association shall continue the design and construction of the accelerator and related facilities" (Modification No. 14, at 1).

And if that were not enough to demonstrate that petitioner is the contractor primarily responsible for the construction called for by the contract, we also have petitioner characterizing itself as *"This Federally assisted construction contractor"* in a November 25, 1978 certification to the government that it does not maintain segregated facilities for its employees "under its Prime Contract No. AT (4908)-3000".[2]

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[2] The contract, originally dated January 23, 1968, "effective as of January 5, 1967" is not in the trial court record and, of course, not therefore in the Record on Appeal in the Court of Appeals. It, or portions of it, may have been furnished to the district court by the petitioner. Respondent has secured a copy of the contract, or portions of it, through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.* Discovery procedures initiated by the respondent and his class prior to submission by petitioner of the summary judgment motion which resulted in the district court judgment reversed in this case by the Seventh Circuit, including procedures for production of documents (see J.A. 64 entitled "Amended First Request to Produce"), were stayed pending disposition of the said motion and determination of the legal question presented. See also *Coutu* opinion, 595 F. 2d 396, at 397. It is apparent that there may be other agreements and documents yet to be discovered, concerning petitioner's Davis-Bacon duties.

2. Purpose and policy of the Act to insure payment of prevailing wages.

In *McDaniel I*,[3] the Seventh Circuit, noting that "we should be especially 'alert to provide such remedies as are necessary to make effective the congressional purpose' J.I. Case v. Borak, 377 U.S. 426, 433 (1964), described that purpose as **"insuring the payment of 'prevailing wages** to laborers and mechanics on all government contracts in excess of $2000" and the "basic premise of this legislation • • • to foster economic stability throughout the nation by **requiring** that those employed on federal projects receive fair and equitable wages." (512 F.2d 583, 587; emphasis supplied.) In *McDaniel II*, again holding that a private remedy under the Davis-Bacon Act is necessary to effectuate the intention of Congress in enacting that statute, the court quoted from 1931 and 1964 legislative history and declared, *inter alia*, that "the plaintiff class of laborers and mechanics are the **'especial' beneficiaries** of the Davis-Bacon Act," that the Act "by its terms **mandates** that the contract • • • provide that laborers and mechanics hired by the contractor be paid the minimum wages determined by the Secretary of Labor to be prevailing for the corresponding class of laborers in the locality," that the laborer is "not only the **principal beneficiary of the statute,** but also a third-party beneficiary of a contract provided for by the statute," and that "the **fundamental purpose of the Act was to benefit laborers** and mechanics by paying them wages prevailing in private industry" (548 F.2d 689, 692-693; emphasis supplied). Noting also that "the Supreme Court of the United States recognized in *United*

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[3] The *McDaniel* case involves employees at Argonne National Laboratory in DuPage County, Illinois; the instant *Coutu* case involves employees at the National Accelerator Laboratory in Kane County, Illinois.

States v. *Binghamton Const. Co., Inc.*, 347 U.S. 171, 74 S.Ct. 438, 98 L.Ed. 594 (1954) that laborers are the primary beneficiaries of the Davis-Bacon Act" (*ibid.*), the Seventh Circuit quoted this Court's *Binghamton* holdings that:

> "The language of the [Davis-Bacon] Act and its legislative history plainly show that it was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects" (347 U.S. at 176-77, 74 S.Ct. at 441); and "On its face, the [Davis-Bacon] Act is a minimum wage law designed for the benefit of construction workers" (347 U.S. at 178, 74 S.Ct. at 442).

See, also, *Bateson-Stolte, Inc.* v. *United States*, 305 F. 2d 386 (Ct.Cl. 1962), where the court said (305 F. 2d at 389): "Let it be remembered that the provision for the payment of a minimum wage was not for the benefit of the contractor and was no warranty that he would not be required to pay a higher wage. United States v. Binghamton Construction Co. 347 U.S. 171, 74 S. Ct. 438, 98 L.Ed. 594."

3. Right to minimum wage is fixed by the Act. Plainly, if the Davis-Bacon Act is to serve the manifest purpose and policy of Congress, it must be recognized that the Act is remedial and required to be "liberally construed to effectuate its beneficent purpose" (*Drivers, Salesmen, Local Union No 695* v. *N.L.R.B.*, 361 F.2d 547, 553 (C.A. D.C. 1966); *Gillioz* v. *Webb*, 99 F.2d 585 (C.A. 5, 1938)). To construe the Act as requiring payment of the statutory wages only if the government contract contains a commitment by the defendant in language even more express and explicit than that which we already have, is to disregard completely the meaning of the Act, its history, its purpose, and indeed, the basic principle that the goal of

statutory construction is to ascertain and effectuate Congressional intent.[4]

Further, all the authoritative references to the effects and the purposes of the Davis-Bacon Act, speak of rights assured to workmen on government projects by the Act. For example, this Court, also in *Binghamton,* teaches that it is the Act itself which fixes and vests the right to the minimum wage. Thus, "The Davis-Bacon **Act requires** that the wages * * * shall be not less than the minimum wages" (347 U.S. at 172, 74 S.Ct. at 439; emphasis supplied). When referring to the Act, our legislators and our courts uniformly and invariably describe it as legislation which assures payment to such workmen of the statutorily-defined minimum wage. Neither the Congress nor

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[4] See, *e.g., Hudson Distributors, Inc.* v. *Eli Lilly & Co.,* 377 U.S. 386, 395, 84 S.Ct. 1273, 1280 (1964) (stating that where "legislative history clearly indicate[s] the purpose of Congress that purpose must be upheld"); *Commissioner* v. *Bilder,* 369 U.S. 499, 505, 82 S.Ct. 881, 884 (1962) (declaring that "we must give the statute effect in accordance with the purpose so clearly manifested by Congress"); *McLean* v. *United States,* 226 U.S. 374, 33 S.tC. 122, 125 (1912) (stating that the Court must "keep in mind the purpose which impelled the enactment"); *Beley* v. *Naphtaly,* 169 U.S. 353, 359-360, 18 S.Ct. 354, 356) (1898) ("The act of Congress should not be so construed as to except from its remedial provisions those who were without an actual grant * * *. Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view * * *. The equitable construction which restrains the letter of a statute is defined by Aristotle * * *."); *McCown* v. *Heidler,* 527 F.2d 204, 207 (C.A. 10, 1975) ("the Act should be interpreted to attain that end" and "should be construed 'not technically and restrictively, but flexibly to effectuate its remedial purposes' ", and "No legislative enactment should be rendered ineffective to attain its purpose if such a construction can be avoided".).

the courts view the Act (as petitioner would have us view it) as legislation simply establishing contract formalities to be followed or not followed at the whim or pleasure of the contracting parties and, if not followed, of no benefit to workmen otherwise performing Davis-Bacon Act construction work.

4. Character of laborers' work determines coverage. The purpose of the Davis-Bacon Act is, of course, to establish substantive rights of workers actually to receive the benefit of the wage rates which Congress has provided for them when they are engaged upon covered work. Both the Federal Procurement Regulations and the regulations of the contracting agency in the subject case (E.R.D.A., now the Department of Energy, formerly the A.E.C.), confirm that position. For example, 41 C.F.R. §1-18.701-2 (1977 ed.) (Federal Procurement Regulations —Labor Standards for Contracts Involving Construction), states in pertinent part:

> "[C]ontracts predominantly for nonconstruction work may also involve construction work. Construction items under such contracts are not exempted from the requirements of this subpart simply because the work is to be performed under a contract which also requires, for example, the furnishing of supplies."

And again, so far as *E.R.D.A.* regulations are concerned, 41 C.F.R. §§9-18.701-52(b) and (b)(1) (1977 ed.) (Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities), state in pertinent part:

> "(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all **work and activities** at the contract location are classifiable as outside of Davis-Bacon Act coverage, since it may be necessary to

> **separate out work which should be classified as covered.** Therefore, heads of procuring activities shall establish and maintain controls for the careful scrutiny of proposed **work assignments** under such a contract to assure that: **(1) * * * If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Davis-Bacon Act.**" [Emphasis supplied].[5]

Thus we see that even under applicable Regulations, it is the actual work performed by a workman which determines whether he is entitled to the Davis-Bacon minimum wage. How the contractor's government contract may be characterized or classified by him or by the contracting agency is not controlling. And it is further clear that under these, as well as previously cited, regulations, the "applicable provisions of the Davis Bacon Act" must be deemed included in the contract and the contract thus appropriately modified, as to work performed by laborers which is within the scope and coverage of the Act. See *Paul* v. *United States,* 371 U.S. 245, 255, 83 S.Ct. 426, 433 (1963) (declaring that Federal Procurement Regulations have "of course, the force of law").

B. Where a government contract clause is required by statute or by procurement regulation to be included in a government contract, that clause is deemed incorporated, as a matter of law, into the contract. The Davis-Bacon Act minimum wage stipulation is part of the subject government contract by operation of law, and employees who perform Davis-Bacon Act work must be paid the minimum wage rates established by the Secretary of Labor's published wage determinations.

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[5] The new Department of Energy regulation is identical. *See* 41 C.F.R. §§9-18.701-52(b) and (b)(1) (1979 ed).

1. **Davis-Bacon clauses in our contract.** Of course, the government contract involved in this cause expressly contemplates that construction work, to which Davis-Bacon Act minimum wage requirements apply, will be performed. The contractor-employer is also required to include all provisions relative to Davis-Bacon Act work in all subcontracts it lets for such construction, although that clause states that it "does not contemplate the performance of [Davis-Bacon] work by the Association, with its own employees". Article XXXIII, para. 1, of the contract (J.A. 55). In addition, however, by letter dated the date of the original contract (January 23, 1968), from the A.E.C. Chicago Operations Office Manager to the president of the petitioner contractor-employer, the further "understandings" of the government and the contractor concerning that contract provision were stated that:

> "If • • • work be performed by the Association with its own employees which AEC determines is subject to the Davis-Bacon Act, *the contract will be modified as appropriate to incorporate the provisions relative to labor and wages required by law.*" [Emphasis supplied.][6] (J.A. 62).

And, further, the district judge to whom the case had first been assigned and to whom, apparently, "a copy of [the contract] ha[d] been submitted • • • by defendant" (J.A. 21), referred in his opinion—rejecting petitioner's motion to dismiss—to further like correspondence between A.E.C. and petitioner, dated April 6, 1972 (the date of Modification No. 14 to the contract), which he

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[6] This is the only other express contract provision *yet* discovered by respondent class relative to Davis-Bacon Act obligations imposed on the contractor-employer itself.

noted "has seemingly been incorporated into the alleged contract" (J.A. 24, 63).

Even in the light of the these *express* contract provisions referring to and confirming the application of Davis-Bacon Act requirements to petitioner itself when and if it performs Davis-Bacon work with its own employees, petitioner still claims that it *itself* is not bound by any such contract provisions, even as to Davis-Bacon Act work *actually performed* by its own employees. Manifestly, the requirements **are expressed in petitioner's contract,** whether or not they are in the precise language that petitioner would prefer.

And as we shall see below, the requirements are in petitioner's contract by operation of law, whether they appear therein via the explicit words which petitioner prefers must be persent, or not.

2. **The Davis-Bacon Act mandatory requirement.** Section 1 of the Davis-Bacon Act (40 U.S.C. §276a) requires, *inter alia,* that

> "every contract * * * **shall** contain a stipulation that the contractor or his subcontrator shall pay all mechanics and laborers * * *the full amounts accrued at time of payment, computed at wage rates not less than those [determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the (locality) in which the work is to be performed]. (Emphasis supplied).

The requirement that every contract involving construction on government projects **shall** contain the required minimum wage stipulation, cannot be construed as any-

thing but mandatory. As was recently said in *Assn. of American Railroads* v. *Castle*, 562 F.2d 1310, 1313 (C.A. D.C. 1977), "The word 'shall' is **the language of command in a statute**, and there is no doubt that the Congress has commanded [what the statute requires]." (Emphasis supplied.)

But we need not rely alone on mere, albeit accurately applicable generalizations. This Court has *already* authoritatively construed the Davis-Bacon Act as mandatory. In *Binghamton*—as here—a government contractor claimed that the wage rates expressly contained in its contract amounted to a binding representation or warranty as to the wage rates which it must actually pay its workers for Davis-Bacon work. This Court concluded—as the Seventh Circuit has concluded in the case at bar—that the contractor's contention must be rejected (347 U.S. at 178, 74 S.Ct. at 442):

> "On its face, the Act is a minimum wage law designed for the benefit of construction workers. **The Act does not authorize or contemplate any assurance** to a successful bidder **that the specified minima will in fact be the prevailing rates.** Indeed, its requirement that the contractor pay 'not less' than the specified minima presupposes the possibility that the contractor may have to pay higher rates. Under these circumstances, **even assuming a representation by the Government as to the prevailing rate, respondent's reliance on the representation** in computing its bid **cannot be said to have been justified.**" [Emphasis supplied.]

Further, it is not only the Davis-Bacon Act itself and the decisions of this Court construing it, which mandate the inclusion of the minimum wage stipulation in our contract. The regulations issued by the Secretary of Labor

pursuant to 40 U.S.C. §276c[7] and Reorganization Plan No. 14 of 1950,[8] complement the requirements of the Act by commanding a like incorporation of the applicable regulations, among which are included the standard contract clauses which stipulate compliance with the Act's minimum wage obligations. See the Secretary's regulations §3.11 (29 C.F.R. §3.11 (1978 ed.)). **"Regulations part of contract"**. Here, too, there is no doubt that "the verb 'shall' in the regulation is mandatory", *Ainslie Corp.* v. *Middendorf,* 381 F.Supp. 305, 308 (D.Mass. 1974).

3. Incorporation of mandatory clauses—the "Christian Doctrine". It is clear that the Davis-Bacon Act minimum wage provisions represent long-standing and fundamental procurement policies of the United States. The cases which deal with government contracts teach that contract clauses made mandatory by **procurement regulation,** are incorporated into government contracts as a matter of law. Is it not even more certain that contract clauses made mandatory by **statute** are so incorporated as a matter of law! Dees and Ginsburg, *Contract Interpretation and Defective Specifications* at 4 (Government Contracts Monograph No. 4, 1975 Edition; The George Washington University); *G.L. Christian and Associates* v. *United States,* 312 F. 2d 418, 160 Ct. Cl. 1, opinion on reargument denied 320 F. 2d 345, 160 Ct. Cl. 58, certiorari denied 375 U.S. 954 (1963), rehearing denied 376 U.S. 929, 377 U.S. 1010 (1964). See also, e.g., *United States* v. *New Orleans Public Service, Inc.,* 553 F.2d

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[7] Section 2 of the Copeland (Anti-Kickback) Act of June 13, 1934, c. 482, 48 Stat. 948; as amended May 24, 1949, c. 139, §134, 63 Stat. 108, and August 28, 1958, P.L. 85-800, §12, 72 Stat. 967.

[8] 5 U.S.C. §903 note, 15 F.R. 3176, 64 Stat. 1267.

459 (C.A. 5, 1977); *City of Tullahoma* v. *Coffee County,* 204 F. Supp. 794 (E.D. Tenn. 1962), rev'd on other grounds 328 F. 2d 683 (C. A. 6, 1964).

In Dees and Ginsburg, *Contract Interpretation and Defective Specifications* (Government Contracts Monograph No 4, 1975 Edition; The George Washington University), the authors cited, among others, the three federal statutes that "impose certain minimum standards for wages * * * of employees working for Government contractors" (*id.,* at 1-2), spoke of the rule that such "statutory requirements and regulations which implement [them] have the force and effect of law [and] contracts made in violation of such requirements are illegal" (*id.,* at 3), and discussed the doctrine which requires that government contracts be interpreted as incorporating mandatory clauses specified by law:

> "In *G. L. Christian & Associates* v. *United States,* the Court of Claims held that the Termination for Convenience clause which had been **consciously omitted by the Government (and the contractor)** had the force and effect of law and was incorporated in the contract as a matter of law. The Court emphasized the fact that **pertinent regulations made the incorporation of the clause in a contract mandatory** and that a Termination for Convenience clause was historically an important component of a Government contract." (*id.,* at 4; emphasis supplied.)

So far as the *Christian* case opinions themselves are concerned (*Christian I,* 312 F.2d 418, 160 Ct.Cl. 1 (1963); and *Christian II,* 320 F.2d 345, 160 Ct.Cl. 58 (1963)), it should be noted that there the contractor's prime objection to the "incorporation" doctrine was that the subject contract clause was required only by "pre-existing **regulation,**" the court pointing out that there was *no* question

but that "if a **statute** requires the inclusion of a * * * clause, such a provision would be read into the agreement **whether the negotiators put it there or not**" (320 F.2d at 350; emphasis supplied). And, speaking further concerning the "incorporation" doctrine, the Court of Claims said (320 F.2d at 350-351):

> "**The concept of such incorporation is not novel.** * * * It was important then, and it is important now, that **procurement policies set by higher authority not be avoided or evaded** (deliberately or negligently) **by lesser officials, or by a concert of contractor and contracting officer.** * * * **Obligatory Congressional enactments are held to govern federal contracts because there is a need to guard the dominant legislative policy against** *ad hoc* **encroachment or dispensation by the executive** [citation]."
>
> "Like other individuals who deal with the Federal Government [citation], potential contractors can validly be bound to discover the published directives telling them the limits and the scope of the agreements the Government can make. Our concern is not at all whether the policy of embodying mandatory contractual provisions in regulations is the best one. Our special interest is only the legality of such a practice, and we hold that, in the procurement field as in others, an authorized regulation can impose such peremptory requirements on federal officials and those who seek to enter into transactions with the Government." [Italics by the court; other emphasis supplied.]

See too, *e.g., United States* v. *New Orleans Public Service, Inc.*, 553 F.2d 459, 469 (C.A. 5, 1977), holding "**the clause is incorporated into the contract, even if it has not been** expressly included in a written contract or **agreed to by the parties**"; *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F.2d 663, 666 (C.C.A. 2, 1929),

holding that "a lawful statute in force at the time the contract was made is read into the contract and becomes part of it" and "Such a **contract must be and is deemed to be modified to conform to the statute**"; 3 *Corbin on Contracts,* §551, at 200-201 (1960 ed.), noting the same result "even though the parties **know nothing** of the statute and do not include the provision, and **even though they know of it and expressly agree upon the exact contrary**"; 17A Corpus Juris Secundum, *Contracts,* §330, at 301 (1963 ed.), noting that "where a provision is integrated into a contract by force of statute, as a matter of public policy, it must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it".

Also of particular signifiance on this point is this Court's opinion in *Hartford Accident & Indemnity Co.* v. *N. O. Nelson Mfg. Co.,* 291 U.S. 352, 54 S.Ct. 392 (1934), where the Court required that a contractor's bond be construed to include a clause required by state statute but omitted from the express terms of the bond, and said:

> "**All that the statute does** by force of section 3 **is to standardize the form,** at least in some particulars, when bonds are freely given, and to define the consequences attaching to the standard thus prescribed. * * *
>
> "Liberty of contract is not an absolute concept. [citations.] It is relative to many conditions of time and place and circumstance. * * * Principal and surety in writing it **became subject to the statutes then in force, and by these they must abide.**" [291 U.S. at 359, 360-361; 54 S.Ct. at 395-396; emphasis supplied.]

4. Applicable prevailing wage determinations exist. The district court entered the summary judgment, the reversal of which by the Seventh Circuit is here on

review, under the erroneous belief that there are and have been no prevailing wage determinations by the Secretary of Labor applicable to the subject government contract. On the last page of its Memorandum Order, the court commented that "it would be improper for this court to declare in the first instance that this contract is now subject to the Davis-Bacon Act and to make appropriate wage determinations for the parties" (see J.A. 34). The trial court need have had no such concern. For many years the Secretary of Labor has issued wage determinations, all published in the Federal Register, appliacble to labor on government projects in Kane County, Illinois, where the subject project is located and where the construction activities required under the contract are being and have been performed. See Statement of Arthur J. Goldberg, Secretary of Labor (Hearings on *Administration of the Davis-Bacon Act,* Committee on Education and Labor of the House of Representatives, 87th Cng., 2d Sess., 1962), at 47, 48, 50; 29 Code of Federal Regulations, *Labor,* Subtitle A, Part I, *Procedures for Predetermination of Wage Rates,* §§1.5(b) and 1.7(a)(2) (1977 ed.); 43 Federal Register 11360, 11379-11383 (March 17, 1978); 42 Federal Register 30078 et seq. (June 10, 1977).

There is no problem in locating the published "General Wage Determinations Decisions" of the Secretary of Labor. One of the most recent compilations is found in 43 Federal Register 11360 *et seq.* (March 17, 1978) and, of course, constructive notice of those determinations exists by reason of their publication in the Register (see, e.g., *Art Center School* v. *United States,* 142 F.Supp. 916, 918 (Ct.Cl. 1956); *Winston Bros. Company* v. *United States,* 458 F.2d 49, 52-53 (Ct.Cl. 1972).

C. A contractor takes a government contract subject to all applicable statutes. All statutes relating to the subject matter of the contract and existing at the time of contracting become a part thereof and must be read into the contract. Our petitioner contractor-employer is charged with knowledge that construction work performed by its employees is subject to the Davis-Bacon Act, and is obligated to pay the statutory wage rates.

1. Davis-Bacon Act is part of all government construction contracts. Whether or not the mandatory stipulation required by the Davis-Bacon Act to be included in "every contract * * * for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works * * *" is deemed incorporated, as a matter of law, into the contract, it is basic hornbook law that *the Davis-Bacon Act itself* is a part of the contract. Statutes relating to the subject matter of a contract and existing at the time of execution of such contract, become a part thereof and must be read into the contract, as if they were expressly referred to or incorporated in its terms.

See, *e.g., Woods* v. *Lovett,* 313 U.S. 362, 370, 61 S.Ct. 983, 987 (1941) ("laws which subsist * * * enter into and form a part of it, as if they were expressly referred to or incorporated in its terms"); *Home Building & Loan Assn.* v. *Blaisdell,* 290 U.S. 398, 429-430, 54 S.Ct. 231, 237 (1934) (concerning Minnesota Mortgage Moratorium Law); *Farmers' & Merchants' Bank* v. *Federal Reserve Bank,* 262 U.S. 649, 660, 43 S.Ct. 651, 655 (1923) ("This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge"); *Hendrickson* v. *Apperson,* 245 U.S. 105, 38 S.Ct. 44, 45 (1917) (Kentucky statute authorizing appointment of special collectors); *Northern Pacific Ry. Co.* v.

Wall, 241 U.S. 87, 91-92, 36 S.Ct. 493, 495 (1916) (Carmack Amendment to the Interstate Commerce Act); *Southern Surety Co.* v. *Oklahoma,* 241 U.S. 582, 587, 36 S.Ct. 692, 694 (1916) (Oklahoma enabling act and Oklahoma Constitution); *Armour Packing Co.* v. *United States,* 209 U.S. 66, 81, 82, 28 S.Ct. 428, 435, 436 (1907) ("the design of the statute to prohibit" "abuses of unequal rates"); *Antoni* v. *Greenhow,* 107 U.S. 769, 2 S.Ct. 91, 95 (1883) (rule applies to "those laws which affect its validity, construction, discharge, and enforcement"); *Walker* v. *Whitehead,* 83 U.S. 314, 317, 21 L.Ed. 357, 358 (1873) (Georgia statute held to impair obligation of contract); *United States ex rel. Von Hoffman* v. *City of Quincy,* 71 U.S. 535, 550 (1867) ("These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement"); *M'Cracken* v. *Hayward,* 11 L.Ed. 397, 399 (1844) ("laws in existence * * * measure of the obligation to perform"); *Ogden* v. *Saunders,* 6 L.Ed. 606, 621-622 (1827) ("the law of the contract * * * forming a part of it"); 17A C.J.S., *Contracts,* §330, at 295 (1963 ed.); 17 Am.Jur.2d, *Contracts,* §257, at 654-656 (1964 ed.); 3 *Corbin on Contracts,* §51, at 197 (1960 ed.); *Williston on Contracts,* §615, at 1767 (1936 ed.); 4 *Williston on Contracts,* §615, at 597 (3d ed. 1961). Thus, as the Ninth Circuit declared in *United States* v. *McKinnon,* 289 F.2d 908, 909 (C.A. 9, 1961), concerning a claim for extra work by a government contractor, "one just must take his government contracts subject to applicable statutes."

2. Petitioner's actions imply assumption of Davis-Bacon obligations. It is asserted in this cause by respondent and the respondent class that they, as employees of the petitioner, were assigned and did perform work constituting construction work within the meaning of the

Davis-Bacon Act. At this point in the proceedings, and for purposes of the summary judgment now on appeal which was granted on other grounds, this assertion must be taken as true. It is clear, then, that to the extent the petitioner's employees were performing Davis-Bacon Act construction work so assigned to them, the petitioner is and has placed itself in the position of a subcontractor under its prime contract. Article XXXIII ("Labor Provisions") of the contract prescribes that such work is to be done by subcontract which shall "contain the provisions relative to labor and wages" required by Davis-Bacon. In the capacity of a subcontractor performing construction work on the project, well knowing of the contract requirement that all such subcontractors are obligated to pay the statutory wages, petitioner must be deemed by implication to have undertaken those same obligations.[9]

It is not unusual for a general contractor also to act as a subcontractor on the job. Indeed, in *Bushman Construction Co.* v. *Conner*, 260 F.Supp. 779 (D.Colo., 1966), it is noted that "The prime contractor did only the cement and carpentry work. All of the other construction was subcontracted" (260 F.Supp. at 782). And anyone familiar with construction activities is familiar with the practice of the general contractor "acting as his own carpentery (or cement, or electrical, or plumbing, or painting) subcontractor."

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[9] Indeed, petitioner in its capacity as prime contractor has entered into a number of construction subcontracts, all including the Davis-Bacon Act required stipulations and the standard contract clauses promulgated by procurement regulations and included within printed forms used with those subcontracts. Copies of certain of those subcontracts have been obtained by the respondent class, again through Freedom of Information Act procedures. 5 U.S.C. §552 *et seq.*

That which is implied in a contract situation is as effectual as what is expressed. *Bulkley* v. *United States,* 86 U.S. 37, 40 (1874) (saying, in addition, that "Human affairs are largely conducted upon the principle of implications"; *Board of Supervisors* v. *Lackawanna Iron & Coal Co.,* 93 U.S. 619, 624, 23 L.Ed. 989, 991 (1877); *Perry* v. *Sindermann,* 408 U.S. 593, 599-602, 92 S.Ct. 2694, 2699-2700 (1972) (affirming reversal of a summary judgment in a teacher's action claiming the existence of a "*de facto* tenure program" for "absence of such an explicit contractual provision may not always foreclose the possibility"). Indeed, the rules with respect to the creation of implied contracts apply in government contract situations, and "A contract may be implied where all the formalities in connection with the execution of a contract have not been complied with" (91 C.J.S., *United States,* §89, at 170 (1955 ed.)).

Assuming then, *arguendo,* that by reason of the government contract in the case at bar our petitioner-contractor is not bound by the Davis-Bacon Act in its capacity as *prime contractor,* it is nonetheless bound as a *subcontractor* who, without question, is expressly authorized by that contract to perform Davis-Bacon Act work and likewise obliged to pay the statutory wage.

D. Contrary to petitioner's Point I.D. (Petr. Brief at 25-28), **the Seventh Circuit's decision is not inconsistent with express terms of the Davis-Bacon Act. The defense that a contract was not advertised or bid, but is instead a negotiated cost-plus-a-fixed-fee contract, was expressly anticipated by Congress in 40 U.S.C. §276a-7. Further, the claim that federal law grants AEC/ERDA/DOE authority to establish contrary specific wage rates is not true and is no defense under 40 U.S.C. §276a-3.**

1. Davis-Bacon applies to all contract types. Petitioner has plainly forgotten to read the last section in

the Davis-Bacon Act. Congress in that section anticipated the very defense which petitioner now asserts in its sub-point I.D.I. (Petr. Brief, at 25-26). That sub-point is entitled "The Act Does Not Apply to a Contractor Unless the Bid Specifications Set Forth the Wage Rate Requirements" (*Id.* at 25). Yet Congress has mandated to the contrary:

> §276a-7. *Cost-plus-a-fixed-fee contracts; contracts without advertisement*
>
> The fact that any contract authorized by this or any other Act is entered into without regard to section 3709 of the Revised Statutes of the United States [41 U.S.C. §5], or upon a cost-plus-a-fixed-fee basis or otherwise without advertising for proposals, shall not be construed to render inapplicable the provisions of the Act of March 3, 1931, as amended by the Act of August 30, 1935 (49 Stat. 1011; U.S.C., title 40, sec. 276(a)), if such Act would otherwise be applicable to such contract.[10]

2. No federal law or approval for contrary wage rates. Simply because AEC/ERDA/DOE has authority to enter into contracts does not mean that it has authority to "provide for the establishment of specific wage rates" within the meaning of 40 U.S.C. §276a-3. Further, the mere fact that certain employee classifications and salary schedules were prepared by petitioner and appended to its contract, does not mean that AEC/ERDA/DOE has established those classifications and rates. Nor does that contracting agency itself view petitioner's action in preparing those classifications and schedules and their attachment to the contract as representing binding contracting agency representations that they are "established" (see, e.g., Kennedy Deposition,

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[10] See also 41 U.S.C. §258 to the same effect.

at 79-82). Petitioner's sub-point I.D.2. (Petr. Brief, at 26-28, entitled "The Act Does Not Apply to the Extent the Government Otherwise Has Established Specific Wage Rates" (*Id.*, at 26), is without substance. As the Seventh Circuit said (595 F.2d at 401-2) in this connection, among other things "defendant has been unable to identify anything in the Atomic Energy Act or any other federal statute that authorizes ERDA to establish specific wage rates."

The Portal-to-Portal Pay Act, at 29 U.S.C. §259(b(3), designates the only agency upon whose written determinations a contractor may rely in defense of its failure to pay Davis-Bacon minimum wages. That agency is the Secretary of Labor, not ERDA nor any other agency, administrator or department. And finally, this Court's *Binghamton* decision precludes petitioner's claim that a contracting agency — whether the Corps of Engineers there or the AEC/ERDA/DOE here — gives "assurance" to the contractor that wage rates included in a government contract "will in fact be the prevailing rates" (347 U.S. at 178).[11]

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[11] At least since the *Binghamton* decision in 1954, and most probably for many years before, government contractors acknowledged that it is the *contractor's* responsibility under the Davis-Bacon Act properly to classify and set rates for their workmen, rather than a responsibility of the contracting agency. See, e.g., the prepared statement of the Associated General Contractors of America before the Special Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives (H. Hrgs. 1962 on "Administration of the Davis-Bacon Act", at 456-457): "The Davis-Bacon Act requires that *contractors* classify and pay their mechanics and laborers at least the required minimum wage rate for the classification commonly used to perform the particular work in the locality of the project" (Emphasis supplied.).

E. The Davis-Bacon Act 1935 amendments were intended, inter alia, to prevent utilization by contractors and agencies alike of every device resulting in non-payment of proper prevailing wages at government projects, including the "arbitrary classification" and "underclassification" device.

1. Senate hearings and Davis-Bacon violations. The 1935 amendments expanded the scope of the Act and sought to prevent all abuses to which the prevailing wage principle in the 1931 Act had been subjected. They were adopted after lengthy hearings in 1934 before a Subcommittee of the Committee on Education and Labor of the Senate, pursuant to Senate Resolution 228 authorizing "an investigation of the relationship existing between certain contractors and their employees in the United States". During those hearings it became clear that the 1931 Davis-Bacon Act requirements were being disregarded on large numbers of government projects. Neither size of the project, nor identity of the government department for which it was being performed, served to insulate a project from non-compliance. None were immune. Sworn testimony was heard concerning devices to evade payment of prevailing wages at, among others, the Department of Justice Building (S. Hearings, at 83-85, 91, 108, 117), the Senate Office Building (*Id.*, at 87), the New House Office Building (*Id.*, at 90-91, 109-117, 152, 153), and even the United States Supreme Court Building in which this brief has been filed and this cause is now pending (*Id.*, at 91, 117).[12]

2. The "arbitrary classification" and "underclassification" device. Among the devices which Congress was in-

[12] More than 90 other federal projects, in the District of Columbia and elsewhere around the nation, were the subject of like testimony at the Senate Subcommittee hearings.

formed were in use as a means to deprive workers on government projects of the prevailing wage which Congress had in 1931 directed that they receive, was the so-called "arbitrary classification" or "underclassification" device. Thus, in its report submitted pursuant to S. Res. 228 (S. Rept. No. 332, part 2, 74th Cong., 1st Sess.), the Committee on Education and Labor, chaired by Senator Walsh, pointed out;[13]

> "Instances of failure by Federal Emergency Relief Administration officials to pay the prevailing wages on Public Works projects, and the creation by such officials of arbitrary classifications known as semi-skilled labor" (S.Rept. No. 332, part 2, at 2).
>
> "[T]he matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts" (*Id.* at 5).
>
> "The Board of Labor Review [created to hear issues under contracts by the Public Works Administration pursuant to the National Industrial Recovery Act] heard many cases in connection with these complaints [concerning "new grades and classifications * * * permitting high-grade skilled laborers to be placed in lower categories so that their rates of pay were less than those prevailing for skilled labor"] but, in the opinion of this committee, have been unable to rectify conditions as affecting a considerable portion of the underclassified laborers" (*Id.*, at 12). "The * * * rates * * * have been largely broken down by intermediate classifications of labor * * *.

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[13] Testimony concerning the "arbitrary classification" device is found in S. Hrgs, Ed.-Lab Subcom. (1934) at 76-77, 82-83, 105, 108, 110, 138, 160, 161, 206, 211, 212, 213, 414, 460, 469, 471, 473, 483.

> The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices" (*Id.*, at 16-17).

These "arbitrary", "under-", "mis-", and "intermediate" classifications had the effect, of course, — if not the purpose — of reducing wages being paid to workmen on government projects below Congress-mandated prevailing wage rates for similar work elsewhere in the community. They still have that effect, and in this cause now on review concerning these respondent workmen before this Court. For, as accurately noted by the United States as *amicus curiae* (*Amicus* Brief, at 11, n. 11):

> "The hourly rates specified by the contract for contractor employees * * * are somewhat less than the prevailing wages established by the Department of Labor for similar classifications of Davis-Bacon Act workers * * *."

3. Neglect of the prevailing wage principle. Congress, of course, can only legislate; it is for the other agencies of government to apply Congresional policy. Yet Congress was informed in the Senate Subcommittee hearings, of numbers of instances where agencies were either ineffective concerning or neglectful of the Davis-Bacon Act minimum wage principle. Thus the Senate Committee on Education and Labor reported that there is "laxity toward contractors guilty of improper practices [existing] in certain Government departments" (S. Report No. 332, part 3, 74th Cong., 1st Sess., at 3), that notwithstanding complaint to certain agencies "no action was forthcoming" (*Id.*, at 4), and that "It is not apparent to the committee in the survey it has caused to

be made * * * that any agencies have been effective in obtaining the results set out for them" (*Id.*, at 16).[14]

The hearings further revealed the identity of many government projects concerning which, notwithstanding claims made to government agencies, workers had *never* received payment or restitution for unpaid portions of their wages.[15] Deficiencies in the District of Columbia alone were asserted to "run into the millions" (S. Hearings, 1934, at 6).

F. The Executive and the Judiciary must defer to Congressional policies represented by the Davis-Bacon Act. The Davis-Bacon Act Congressionally-mandated effects on the procurement process may not be avoided, even to satisfy other proper procurement objectives.

No one can deny that the procurement process would be easier and cheaper for the government and for certain government contractors, had Congress not enacted the Davis-Bacon Act (40 U.S.C. §276a *et seq.*), the Walsh-Healey Public Contracts Act (41 U.S.C. §35 *et seq.*) and the McNamara-O'Hara Service Contract Act (41 U.S.C. §351 *et seq.*). Yet these statutes represent important

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[14] Testimony supporting these conclusions is in Hearings before the Subcommittee of the Committee on Education and labor of the U.S. Senate, 73d Cong., 2d Sess., pursuant to S.Res. 228 (1934), at, e.g. 16-17, 18, 24, 30, 60, 62, 68-69, 95-96, 138, 141, 142, 144, 150, 176, 181, 538, 623.

[15] Among these projects were, again, the Department of Justice Building (S. Hearings, 1934, at 84), the New House Office Building (*Id.* at 91), the N.Y. Federal Courthouse (*Id.* at 137, 138), and others noted at *Id.* 6, 10, 17, 18, 19, 21, 24, 26, 32, 60, 76, 88, 89, 107, 118, 141, 142, 193, 203, 259. The workers *were* made whole, however, concerning the Supreme Court Building project (*Id.* at 91).

policy decisions which have been consistently reaffirmed by Congress, notwithstanding their impact on the procurement porcess.[16] Thus, the Attorney General of the United States, in an opinion issued on March 9, 1979, in response to a request of the President (43 Op. Atty. Gen. (op. no. 14); see 1979 Labor Law Reports (C.C.H.), ¶31,253 (4-13-79)), has noted:

> "Congress considered the contract labor standards statutes to be among the 'ancillary' statutes which affect procurement [citing at fn. 32: S.Rept.91-427, 91st Cong., 1st Sess., at 6, 13-14; H.R.Report 91-468, 91st Cong., 1st Sess., at 151.]. * * *
>
> "[These are] statutory socio-economic programs implemented through the procurement process * * * [which the 1969 Commission on Government Procurement] viewed * * * as extraneous burdens on the procurement system [noting at fn. 49: See CGP Report, vol. 1, at 111-18. The report refers to the Labor Department's wage-hour regulations as 'collateral' ones that 'affect' procurement. Id. at 33.]
>
> "As the Commission report points out, these programs serve a broad variety of interests: labor, environment, small business, anti-discrimination, protection of domestic industry, and others. * * * The contract wage-hour statutes in particular are the result of a strong legislative concern that the government's general interest in efficient, economical procurement will not be satisfied at the expense of contractors' employees. [noting at fn. 52: See H.R. Rept. 1162, 74th Cong., 2d Sess., at 2 (Davis-Bacon Act); S.Rept. 1157, 74th Cong., 1st Sess., at 4 (Walsh-

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[16] "[A] clear public policy of insisting that *all* who do business with the Government pay employees minimum prevailing wages thus seems to be indicated." Statement of the Deputy General Counsel, *Office of the Comptroller Gener*al, H.R. Hearings, 1962, at 287 (emphasis supplied).

Healey Act); H.R.Rept. 948, 89th Cong., 1st Sess., at 3 (Service Contracting Act).]."

The effects of the legislative policies represented by the Davis-Bacon Act and thus described, are effects which the government procurement agencies and government contractors must accept, and to which the courts must defer. Our petitioner has, of course, any number of contractual, administrative, judicial and statutory remedies in proceedings involving the government, for any uncertainties, inequities and improprieties petitioner has sustained or may hereafter suffer by reason of its contract.[17] Congress has authorized a suspension of the provisions of the Act only by the President, and by him only "in the event of a national emergency" (40 U.S.C. §276a-5). Its requirements cannot be suspended, nor liability for violation of its provisions defended, by simply disregarding or neglecting it.

G. The decision of the Seventh Circuit does not affect administrative functions under the Davis-Bacon Act. Further, there is no administrative procedure available to an employee for adjudication and vindication of his claim that he has performed Davis-Bacon Act work under a Davis-Bacon Act contract, for which his contractor-employer has not paid the published Davis-Bacon Act minimum wage.

The Seventh Circuit in the case at bar has done nothing to affect or impair whatever any administrative func-

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[17] See, for example: (a) Contract Disputes Act of 1978, 41 U.S.C. §§601-613, P.L. 95-563, (b) Wunderlich Act, 41 U.S.C. §§321-322, (c) 42 U.S.C. §7194(a)(b), providing for Department of Energy adjustments to rules, regulations and orders to prevent special hardship, inequity or unfair distribution of burdens, (d) Disputes Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-7.802-5, (e) Equitable Adjustments Clause, AEC/ERDA/DOE regulations, 41 C.F.R. §9-1.5004-2.

tions assigned by the Davis-Bacon Act. Its decision that the Act applies concerning this government contract has no effect on the functions of the Secretary of Labor in making the prevailing wage rate determinations upon which respondent here relies (40 U.S.C. §276a), the functions of the Comptroller General to pay over to laborers (from any accrued contract payments which may have been withheld) any wages found to be due them pursuant to the Act (40 U.S.C. §276a-2(a)), or the functions of the Comptroller General to distribute a list of defaulting contractors to all departments of the government (40 US.C. §276a-2(a)).

Further, the decision does not interfere with or disregard any agency or agency procedure assigned by law to adjudicate respondent's claims and vindicate his rights. There is no such agency, nor any such procedure. The court of appeals sought unsuccessfully to uncover some (see 595 F.2d 396, 400; J.A. 43); the United States noted that there is none (see *Amicus Brief*, at 9, fn. 7);[18] and the petitioner has failed to point to one. Finally, the Solicitor of Labor, the Comptroller General, and even the (then) Atomic Energy Commission, have all testified (H.R. Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor, on "Administration of the Davis-Bacon Act", 87th Cong., 2d Sess., 1962) that even among the agencies themselves there is no agreement concerning decision-making under the Act—except for the above-noted functions explicitly

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[18] "There is no administrative procedure now available expressly providing review * * *. Several contracting agencies, including the Department of Energy, have objected to the proposed regulations * * *." (*Ibid.*)

assigned by the Act itself.[19] Is it any wonder, then, that neither the Seventh Circuit nor the United States nor the petitioner nor the respondent has found an agency—other than our courts—in which the within claims and rights can be adjudicated and enforced.[20]

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[19] See, for views of the *Labor Department* on this "situation which is presently complicating effective administration and enforcement of the act", H.R. Hearings 1962, at 831-832, 901-902 ["we say the law has meant one thing and * * * the Comptroller General * * * has said that it means another"], 912-919; for views of the *Comptroller General* that "jurisdiction over enforcement activities under the act is at best divided", H.R. Hearings 1962, at 284, 285 ["delays enforcement action and promotes inconsistencies"], 285-286 ["assumption of authority to determine amounts of wage underpayments under * * * the Secretary's regulations has caused conflict"], 290, 295 ["The Davis-Bacon Act, itself, appears to make us responsible for determining the extent of violations for purposes of debarment and wage adjustments"], 297 ["Nobody is given the authority to make the final determination. Certainly it is denied to the contracting agencies and is not given to the Secretary of Labor."], 298-300, 321, 322, 1127-1128 ["the Secretary of Labor must be eliminated from consideration for the reason that there is no language giving him authority except that of determining prevailing wage rates. * * * Nowhere is a contracting agency authorized to make final determinations of the amounts due aggrieved workers * * *.], 1128-1131; for views of the *Atomic Energy Commission*, H.R. Hearings 1962, at 615-616, 619-620 ["It is all very informal and sort of works this way."], 634-635 ["A.E.C. procurement regulations * * *are not regulations in the most formal sense * * *."].

[20] In addition to the noted conflict among the agencies as to which has what functions in attempts to enforce the Davis-Bacon Act, it is also clear that the statutory scheme does *not* place the matter of construction of the coverage terminology within the special competence of any of the various agencies. As the *Solicitor of Labor* advised in his additional prepared statement, H.R. Hearings,

II.

WAGE-EARNERS HAVE A RIGHT OF ACTION AGAINST THEIR CONTRACTOR-EMPLOYER TO RECOVER UNPAID WAGES REQUIRED BY THE DAVIS-BACON ACT (40 U.S.C. §§276a-276a-7) **AND BY THE GOVERNMENT CONTRACT PROVISIONS REQUIRED BY §276a OF THE ACT, WHEN—BECAUSE THERE ARE NO CONTRACT AMOUNTS WITHHELD SUFFICIENT TO ASSURE EMPLOYEE PAYMENTS** (see 40 U.S.C. §276a-2(a)) **NOR IS THERE A SURETY PAYMENT BOND FOR THE PROTECTION OF EMPLOYEES** (see 40 U.S.C. §276a-2(b))**—SUCH EMPLOYEE RIGHT OF ACTION IS THE ONLY REMEDY AVAILABLE TO MAKE EFFECTIVE THE CONGRESSIONAL PURPOSE OF THE DAVIS-BACON ACT TO REQUIRE CONTRACTORS TO PAY THEIR EMPLOYEES THE WAGES REQUIRED BY THE ACT.**

A. The "right of action" question was not raised, briefed, argued or ruled on in the proceedings below which have been brought here for review. Should the Supreme Court elect, nevertheless, to consider this question, it must be presumed that the courts below

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[20] (Continued)
1962, on *"Administration of the Davis-Bacon Act,"* at 822: "No attempt was made by Congress in 1931, 1932 or 1935 to formulate definitions for the terms 'construction, alteration and/or repair,' or the terms 'public buildings and public works.' It thus seems clear that Congress intended no specialized meaning for this language. * * * The terms 'construction, 'prosecution,' 'completion,' and 'repair' have also been defined by the regulations to incorporate the generally accepted, practical meaning of these words as intended by Congress * * *." And, of course, our courts have no difficulty in applying statutory language to the facts. See, *e.g., U.S. (Hillsdale Rock Co., Inc.)* v. *Cortelyou & Cole, Inc.,* 581 F.2d 239, 243 (9th Cir. 1978), where the Ninth Circuit agreed with the district court that "Hillsdale's efforts were involved in the 'construction, alteration, or repair of any public building or public work of the United States' ".

> **have found and concluded** (as in *McDaniel v. University of Chicago,* 7 Cir., 512 F.2d 583 and 548 F.2d 689, certiorari denied 434 U.S. 1033) **that such employee right of action is the only remedy available to make effective the congressional purpose to require contractors to pay their employees the wages required by the Act.**

Respondents have heretofore, in our "Brief in Opposition to Petition for Certiorari (at 26-29) and in paragraphs 6-7 of the "Statement of the Case" in our instant brief (at 5-8), sufficiently delineated the factual and procedural posture of this cause at the time it was brought here for review. There was **no** question in the courts below on the summary judgment which the Seventh Circuit reviewed and reversed (*Coutu* v. *Universities Research Association, Inc.,* 7 Cir., 595 F.2d 396-402; J.A 35-46) concerning the existence of an employee right of action. The closest petitioner ever got to that question, and only then with respect to the "contract" issue (Point I in this brief) rather than to any "right of action" issue was petitioner's assertion that "Plaintiff Failed To Exhaust Administrative Remedies" (Deft. Brief, 7th Cir. Docket No. 78-1165, at 14-16).

Further, our respondents assert in this case that their right of action exists under circumstances which render other statutory relief unavailable. Thus it must be presumed (as the lower courts doubtless would have found if the "right of action" issue had been raised below) that there are no amounts withheld by the government from which respondents might be paid, *see* 40 U.S.C. §276a-2(a), and that petitioner has not submitted a surety payment bond on which respondents might sue to recover unpaid wages, *see* 40 U.S.C. §276a-2(b).

The argument under this point II, therefore, is presented in the event this Court elects to consider the "right of action" question.

B. There is a private right of action for back wages against a contractor in favor of employees who have performed Davis-Bacon Act work under a contract procuring Davis-Bacon Act work of "construction, alteration and/or repair, including painting and decorating, of public buildings or public works of the United States". There is no administrative determination that this contract is not covered by the Act, nor does the right of action here asserted require any such determination.

1. The Davis-Bacon Act governs concerning this contract. Both petitioner and the United States as *amicus* concede that the right of action **does** exist if the Davis-Bacon Act "obligation was assumed or * * * contemplated by the contracting parties" (Petr. Brief, at 30), or if the suit concerns "a contract that contains Davis-Bacon stipulations" (*Amicus* Brief, at 17, n. 14), and that "An employee should also be able to recover in a contract action if Davis-Bacon Act stipulations are inadvertently omitted from a contract [since] the Davis-Bacon stipulations would be deemed to be incorporated by operation of law" (*Ibid.*)[21] The instant suit satisfies those descriptions of employee private suits which even petitioner and the United States agree are proper.

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[21] *Amicus,* suggests that the "incorporation by operation of law" doctrine described in the *Christian* opinions, 312 F.2d 418 (Ct. Cl.), rehearing denied, 320 F.2d 345, cert. denied, 375 U.S. 954 (1963), requires that "the contracting agency concedes that the omission was erroneous" (*Amicus* Brief, at 17, n.14). No such requirement for a government agency concession is present in the *Christian* case or in the other authorities which deal with the doctrine.

Respondents have hereinbefore summarized the facts which show that the instant government contract **is** covered by the Davis-Bacon Act and that the contracting agency (AEC/ERDA/DOE) **does** view it as covered. Statement of the Case, at 3-4. The facts are also clear that to the extent that the petitioner contractor-employer uses its own employees for Davis-Bacon Act work, the agency views that work as covered. *Ibid.* Petitioner and *amicus,* however, without pointing to any governmental ruling or decision characterizing the contract as not covered by the Act, make that non-existent ruling the *sine qua non* and the essence of their position. (See, *e.g.,* Petr. Brief at 2, *Amicus* Brief at 1, 17). Respondent and the respondent class do *not,* however, assert the existence of any "erroneous coverage determination", and their right of action does not depend upon the assertion or existence of administrative error.

Whatever may be the reason—and whether that reason involves administrative or contractor individual or collaborative error, disregard, neglect or intent—the express statutory requirements provided in the Davis-Bacon Act as means by which respondent wage-earners might recover their unpaid minimum wages have not been implemented. The contracting agency did not withhold funds from the petitioner, *see* 40 U.S.C. §276a, and the petitioner did not submit a surety payment bond, *see* 40 U.S.C. §276a-2(b). In addition the agency did not invoke available sanctions of termination, *see* 40 U.S.C. §276a-1, and the Comptroller General did not invoke the available blacklisting procedure, *see* 40 U.S.C. §276a-2(a).

2. This right of action is predicated on Davis-Bacon Act rights. The Davis-Bacon Act manifestly confers a private right of action upon wage-earners. Congress in-

tended it and the Act refers to it. Petitioner, however, would have that suit limited only to situations where the government contract contains explicit and complete contract clauses detailing all a contractor's Davis-Bacon Act duties. The United States, on the other hand, approves suit "if Davis-Bacon Act stipulations are inadvertently omitted from a contract" (*Amicus* Brief, at 17, n.14), but would have that suit limited only to situations where the contracting agency concedes that the omission was inadvertent. Neither limitation is proper nor required by the Act, by administrative functions assigned by the Act, or by concerns for economy.

Neither the United States nor this Court need be concerned about the costs involved in complying with Davis-Bacon nor the extent of private litigation to be anticipated. At least as late as 1962, it was made clear by the Deputy General Counsel of the Office of the Comptroller General and the Chairman of the House Subcommittee on Labor, that very few enforcement attempts—governmental or private—had been made by any procedures whatever[22]; and by the then Solicitor of Labor that even employee wage suits on the required payment bounds have "not been effective in the past; it has not been used. It exists under the Davis-Bacon Act, but it has not been used under the Davis Bacon Act." H.R. Hearings, 1962, at 902. And so far as costs are concerned, the Solicitor's prepared statement submitted to the Subcommittee on Labor of the Committee on Education and Labor of the House of Representatives, contained a section entitled "Does the Davis-Bacon Act Inflate Federal Construction Costs", answered "no" to that question, summarized the evidence for that conclusion, and restated

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[22] H.R. Hearings, 1962, on "Administration of the Davis-Bacon Act", 87th Cong., 2d Sess., at 301-302.

the congressional policy decision upon which the Act is based. (H.R. Hearings, 1962, at 818-819.)[23]

Thus we come to one of the few suits ever filed under the Davis-Bacon Act—the suit which **did** deal directly with the right of wage-earners to sue their contractor-employer when there is no payment bond available—*McDaniel* v. *University of Chicago,* 512 F.2d 583 (7th Cir. 1975), reaffirmed on remand, 548 F.2d 689 (7th Cir. 1977), certiorari denied, 434 U.S. 1033 (1978). There the right of action upon which in the instant case, too, respondents rely, was discussed. In *McDaniel I,* the Seventh Circuit held that since the employees had available to them neither direct payment by the government out of amounts withheld, nor an action against their employer and its surety on a surety payment bond, the employee suit against their contractor-employer alone was required and "consistent with the congressional purpose in the Davis-Bacon Act". *See* 512 F.2d at 585, 587.

In *McDaniel II,* after remand by this Court "for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour,* 421 U.S. 412 (1975) and *Cort* v. *Ash,* 422 U.S. 66 (1975)", 423 U.S. 809 (1975), the Seventh Circuit reaffirmed *McDaniel I.* In the course of its second opinion, the court in *McDaniel II* dealt at length, *inter alia,* with the two factors which petitioner and *amicus* now claim as the basis for denying the right of our respondents to whatever remedy remains under the Davis-Bacon Act after agency and contractor non-compliance with the withholding and bonding requirements es-

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[23] See also the Solicitor's testimony that "Congress has not injected a cost factor into the Davis-Bacon Act as one of the standards to be used in determining which wage rates will apply" (H.R. Hearings, 1962, at 153), and earlier like testimony of then Secretary of Labor Arthur J. Goldberg (*id.*, at 47, 49, 53, 55)).

tablished by law.[24] In *McDaniel II*, the court considered all factors in light of this Court's opinions in *Cort* and *Securities Investor*, and disagreed directly and emphatically with assertions now again made by petitioner and *amicus*. Thus the Seventh Circuit held, *inter alia*, (a) that far from there being any congressional intent to deny this remedy, Congress intended it, (b) that Congress later also recognized "that laborers have rights of action under the contractual provisions required by 40 U.S.C. §276a," (c) that Congress also recognized that "laborers are able to sue at least as third-party beneficiaries of the contract required by 40 U.S.C. §276a," (d) that "Davis-Bacon Act contemplates by its terms some private enforcement" and "a private action," and that "the policy * * *, private suit, is not really in question," and (e) that because the other remedies based on withholding of contractor payments and the submission of a surety payment bond were "ineffective" this "private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute". *See* 548 F.2d at 694-695.

3. Congress has approved, not disapproved, the private right. *Amicus* claims that Congress rejected employee wage suits because it rejected Congressman Goodell's amendment which would have allowed "judicial review" (*Amicus* Brief, at 24-25). The amendment was introduced for the purpose of permitting judicial review of the Secretary of Labor's prevailing wage determina-

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[24] The two factors asserted in defense of the existence of an employee private suit, are "strong evidence of congressional intent to deny any remedy other than the enforcement provisions expressly contained in the Davis-Bacon Act" (see *amicus* brief, at 23; petr. brief, at 31); and "It would also be inconsistent with the legislative scheme to imply a private enforcement remedy" (see *amicus* brief, at 30; petr. brief, at 31).

tions.[25] In the case at bar, as in *McDaniel,* the wage-earners *rely* on the Secretary's wage determinations, and simply seek in this suit to recover what they are due by reason of those determined wage rates.

Amicus also claims that Congress did not know what it was doing when it enacted the Portal-to-Portal Act limitations provisions concerning suits (including class actions) under the Davis-Bacon Act. (*Amicus* Brief, at 24-29). Plainly, however, Congress knew what it was about. Much of the debate in 1947 related to the advisability and propriety of including the Davis-Bacon Act and the Walsh-Healey Public Contracts Act, along with the Fair Labor Standards Act, in the 1947 legislation.[26] Congress also knew what it was doing when it rejected S. 70, a bill similar to H.R. 2157, but which contained no reference whatever to the Davis-Bacon Act or to the Walsh-Healey Public Contracts Act. *Cf.* S. Report No. 37 (80th Cong., 1st Sess.) concerning S. 70.[27]

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[25] See, e.g., Congressman Fogarty's statement, 110 Cong Rec. 1201 (1964).

[26] In addition to at least 70 separate references to the Davis-Bacon Act in the Senate debates (93 Cong. Rec. 2081-2098, 2110-2135, 2175, 2192-2198, 2230-2277, 2287-2311, 2348-2377, 4371-4372 (1947)), and over 20 separate references to the Davis-Bacon Act in the House debates (93 Cong. Rec. 1488-1517, 1556-1574, 4383-4391 (1947)), there are like references in the lengthy S. Report No. 48, in H.R. Report No. 71, and in the Conference Report (H.R. Report No. 326, 80th Cong., 1st Sess.), on H.R. 2157 which became the Portal-to-Portal Pay Act of 1947.

[27] Further, *amicus'* assertion that "reference in 29 U.S.C. 255 to the Walsh-Healey and Davis-Bacon Acts was itself an afterthought" reflects just what vocal opponents of the Portal-to-Portal Act argued in seeking to exclude the Davis--Bacon Act and Davis-Bacon suits from its coverage. See, e.g., S. Report No. 48, "Minority Views," at 2-3. Both the Senate and the House rejected that assertion, and H.R. 2157, as amended in conference, became law.

Amicus forgets that there is *no* limitation provision set forth in the Davis-Bacon Act, 40 U.S.C. §§276a-276a-7. There is a one-year provision for suits under the Miller Act, 40 U.S.C. §§270a-270e, concerning "Every suit instituted under this section" [§270b(b)]. Suits instituted under the Davis-Bacon Act are not suits instituted under section 270b of the Miller Act. In addition, however, suits arising under the Davis-Bacon Act and predicated on rights established by that Act alone, are expressly subject to the Portal-to-Portal Act two-year (if by willful violation, three-year) limitation provision (29 U.S.C. §255 (a)). Thus the Portal-to-Portal Act not only affirms the existence of a Davis-Bacon Act private action, but clearly excludes the proposition that such right of action is predicated upon or is limited to an action pursuant to the provisions of the Miller Act. Were the right of action indeed so limited, it would have to be barred after one year — not two years (and for willful violation, three years) — to be consistent with the Miller Act and to obviate additional multitudes of legal and practical problems arising out of any presumed conflict between these limitations provisions.

Amicus suggests next that a private right of action in favor of laborers and materialmen "cannot be inferred from the obligations imposed on contractors under [the Miller Act]", so "there is no reason to infer a similar private right of action in favor of laborers and mechanics from the obligations imposed under [the Davis-Bacon Act]" (*Amicus* Brief, at 29, n. 23). The fact that the one statute is not the other, and the differences in the purposes and history of them both, are reason enough. But in addition, the basic premise of *amicus* is incorrect, for

> **"Where the general contractor fails to furnish such a bond, the laborers and materialmen * * * may sue the general contractor and recover from him.** *Strong* v. *American Fence Const. Co.*, 245 N.Y. 48" (*Seaboard*

Surety Co. v. *Standard Acc. Ins. Co.*, 277 N.Y. 429 (1938); emphasis supplied).

Thus, the prime authority quoted by *amicus* for its proposition is noted as *authorizing* and not rejecting a private remedy for an intended beneficiary when there is no contractor's bond. And as to the remaining cases cited (*Amicus* Brief, at 28-29), *none* of them stand for the proposition asserted.

Finally, *amicus* suggests that it "would be inconsistent with the legislative scheme" (*Amicus Brief,* at 30-35) to permit these wage-earners a remedy for the deprivation of their wages earned under and assured to them by the Davis-Bacon Act. There is no inconsistency. We have already pointed to the evidence establishing that this suit does not affect administrative functions under the Davis-Bacon Act, that there are no administrative procedures available to employees for adjudication and vindication of their Davis-Bacon Act rights, and, indeed, that "Nobody is given the authority to make the final determination" (Resp. Brief, at 38). In these circumstances, then, *to refuse* respondents a remedy when Congress has so clearly intended that they be paid for their labor the amounts to which the Act entitles them by right, would amount to action patently inconsistent with the legislative scheme. And that deprivation would not alone be contrary to the legislative purpose and scheme; it would conflict with basic Fifth Amendment due process rights. See *United States ex rel. Von Hoffman* v. *City of Quincy,* 71 U.S. 403, 410 ("A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. * * * A different result would leave nothing * * * but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.")

Notwithstanding the general and conclusory assertions by petitioner and *amicus* concerning the effect upon re-

spondents' cause of this Court's recent "private right of action" trilogy (see Petr. Brief, at 30-31; *Amicus* Brief, at 19-20, 34), it is clear that this private suit satisfies all the appropriate criteria. Thus, for example,

(1) this being a situation "in which it is clear that federal law has granted a class of persons certain rights," the remedy exists unless it is shown that Congress had "an explicit purpose to deny such cause of action." *Cannon* v. *University of Chicago,* 99 S.Ct. 1946, 1956 (1979);

(2) the remedy being "necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon, id.,* at 1961;

(3) the fact that other provisions of the Davis-Bacon Act (*see, e.g.,* 40 U.S.C. §276a—2) "create express remedies [is not acceptable] as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section" (*see* 40 U.S.C. §276a). *Cannon, id.,* at 1965;

(4) to the extent that Congress may be said to have failed "expressly to consider [this] private remedy is not inevitably inconsistent with an intent on its part to make [this] remedy available" for this intent appears "implicitly in the language or structure of the statute, or in the circumstances of its enactment." *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 100 S.Ct. 242, 246 (1979).

(5) since the statute declares and creates certain employee rights, the statute "by its terms necessarily contemplates that the issue of [those rights] under its criteria may be litigated somewhere." *Transamerica, ibid.*

(6) the fact that employees were intended by Congress as the especial beneficiaries of the minimum wage rates required to be paid them under the Davis-Bacon Act, "strongly suggests that Congress was [not] unwilling to impose * * * potential monetary liability to a private suitor". *Transamerica, id.,* at 248.

(7) this being a situation in which "the statute in question * * * prohibited certain conduct or created federal rights in favor of private parties," it falls within the class of those cases in which implied private remedies exist. *Touche Ross & Co.* v. *Redington,* 99 S.Ct. 2479, 2485 (1979).

(8) this is a situation "where congressional purposes are likely to be undermined absent private enforcement" and the private remedy is sought by "the particular class intended to be protected by the statute". *Piper* v. *Chris-Craft Industries, Inc.,* 430 U.S. 1, 25, 97 S.Ct. 926, 941 (1977). Plainly, since a purpose of "conferring a right of action on employees to recover from the contractor" (*United States* v. *Binghamton,* 347 U.S. 171, 176 (1954) is expressed in the statute itself, the private remedy serves "rationally to complement its remedial scheme" (see *Whirlpool Corp.* v. *Marshall,* 100 S.Ct. 883, 891 (1980)).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

HUGH B. ARNOLD
DANIEL N. KADJAN
ARNOLD AND KADJAN
11 South LaSalle Street
Chicago, Illinois 60603
(312) 236-0415

ROBERT JAY NYE
NYE AND NYE
420 North Euclid Avenue
Oak Park, Illinois 60302
(312) 386-7373

Attorneys for Respondent Stanley E. Coutu, and the Respondent Class.

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APPENDIX

Portions of opinion of the Court of Appeals for the Seventh Circuit, in Coutu v. Universities Research Association, Inc., 595 F.2d 396 (J.A. 35-46):

"This action was brought by plaintiff, an electronics technician, and his class seeking $5,000,000 in damages and other relief on the ground that defendant did not pay them the prevailing wages required by the Davis-Bacon Act (40 U.S.C. §276 *et seq.*) for their construction work. Defendant is a not-for-profit consortium of universities formed to facilitate scientific research and to design, construct and operate the Fermi National Accelerator Laboratory in Batavia, Illinois. This facility is a 6800-acre Kane County site containing laboratories, research offices, related facilities, and the world's largest proton accelerator system. It is used to carry out research in the field of high-energy physics by numerous scientists from institutions located throughout the world. (App. 50 n. 3.) The Davis-Bacon Act requires government construction contracts to contain a provision stating that the minimum wages to be paid various classes of laborers and mechanics shall be based upon the wages to be determined by the Secretary of Labor to be prevailing where the work is to be performed. 40 U.S.C. §276a(a). * * *.

"Plaintiff and his class alleged in their 'First Cause of Action' (hereinafter 'Count I') that defendant violated the Davis-Bacon Act by not paying members of plaintiff's class the minimum wages 'required to be paid pursuant to the said contract and the prevailing wage determinations of the Secretary of Labor and the Davis-Bacon Act' (App. 2). Count I was dismissed in an unreported October 8, 1975,

memorandum opinion and order of [a district judge]. However, that order did not dismiss the remaining six Counts of the complaint.

"On August 10, 1976, [another district judge] to whom the class action had been transferred, certified the plaintiff class. Discovery was apparently stayed in February 1977. In March 1977, defendant filed a motion for summary judgment. In November 1977, [the district judge] handed down a memorandum order granting that motion. The court noted that in Count II the plaintiff class alleged that the contract fell within the purview of the Davis-Bacon Act and that the contract by its terms provides for 'payment to members of plaintiff class at the legal wage rate applicable to work actually performed.' * * * The court then held that the contract failed to contain the 'requisite Davis-Bacon Act specifications for maintenance of the claims stated in Count III' and accordingly dismissed that Count. Counts III through VII of the complaint were based on state claims, and the district court declined to assert pendent jurisdiction over them 'due to the legally insubstantial nature of the federal claims.' Therefore, the complaint was dismissed in its entirety.

"* * * [I]n dismissing Count I [the first district judge] held only that if the contract was not a Davis-Bacon Act contract plaintiff could not recover. Clearly if a contract contains the required wage stipulations, this would show that it was a Davis-Bacon Act contract. [That district judge] apparently recognized, however, and we agree, that clauses in the contract other than the wage stipulations may reveal that the contract was one for Davis-Bacon Act work (App. 25).

"Thus two theories of recovery remained open to the plaintiff class after [the first district judge's] dismissal: (1) there may have been Davis-Bacon Act stipulations in the contract or (2) there may have

been other evidence that the contract was one for Davis-Bacon Act work, in which case the required stipulations arguably become a part of the contract by operation of law. [The second district judge's] grant of summary judgment was based on the affidavit (n. 4 supra) tending to disprove only the first of these two theories. We hold that summary judgment was improperly entered against plaintiff and his class because the required wage stipulations were incorporated by operation of law.

"The Davis-Bacon Act Applies to Construction, Alteration or Repair Work Performed by Defendant

"The key provision in the contract between defendant and the United States Government acting through ERDA is Article XXXIII which provides in pertinent part as follows:

> 'This contract does not contemplate the performance of work by the Association, with its own employees, which the Commission determines is subject to the Davis-Bacon Act. Such work, if any, performed under this contract shall be procured by subcontracts which shall be subject to the written approval of the Commission and contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work.'

In this lawsuit, plaintiff contends that defendant's own employees performed and are performing construction, alteration and repair work at the Fermi Laboratory, so that the Davis-Bacon Act wage provisions are applicable to the work done by plaintiff and his class. We agree that if the defendant actually performed such work with its own employees at the

Fermi Laboratory, they became entitled to the prevailing wages in Kane County where the work was to be performed. * * *

"Indeed, in a January 23, 1973 [sic. 1968], letter from the Atomic Energy Commission's Chicago Operations Office Manager to the president of the defendant, both these parties foresaw that conditions might arise which might make it necessary for the defendant to perform Davis-Bacon Act work and in such instance to modify the contract to incorporate the Davis-Bacon Act provisions relative to labor and wages. Since under *McDaniel I* the contract was already so modified by operation of law, amendments to the cotnract were not needed to accomplish that result.

"* * * Because the provision to pay the prevailing wage rate was incorporated by operation of law, the affidavit relied upon by the district court to the effect that no Davis-Bacon Act 'stipulations requiring the payment of prevailing wages have ever been made a part of or incorporated in' the contract (see n. 4 supra) is insufficient to support the grant of summary judgment. * * *

"It is uncontested that the Secretary of Labor has published general wage determinations in decisions published in the Federal Register that are applicable to labor on government projects in Kane County, Illinois, where the Fermi Laboratory is located and where the defendant's alleged construction activity has been performed. Therefore the district court was mistaken in concluding that to sustain plaintiff's position would require it to make wage determinations for the parties.

"Exhaustion of Administrative Remedies Is Not Required

"If defendant or our own research had uncovered administrative regulations affording plaintiff and his class relief in this situaton, we might require recourse to that remedy before permitting this lawsuit to proceed. The Davis-Bacon Act itself does not contain a provision requiring exhaustion of administrative remedies in this kind of case. Moreover, we rejected such an argument in the second *McDaniel* case where the University of Chicago had argued that administrative procedures afforded adequate relief to the individual employees of a government contractor. * * * As the Government itself recognized in *McDaniel II.*

> 'Neither the statute nor the regulations promulgated thereunder provide any administrative remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract.' (Solicitor General's *amicus curiae* brief opposing the petition for a writ of certiorari in *University of Chicago and Argonne* v. *McDaniel,* 434 U.S. 1033, at 25, n. 20.)

"* * * Plaintiff must now be permitted to resume discovery (or employ other suitable means) to determine whether defendant used plaintiff and his class to perform construction, alteration or repair work at the Fermi Laboratory. If so, under the Davis-Bacon Act they will be entitled to recover wages that the Secretary of Labor has determined to be prevailing for the corresponding classes of laborers and mechanics employed on similar projects in Kane County, Illinois. Since the district court had jurisdiction over Count II, it also had pendent jurisdiction to decide state claims presented in Counts III-VII."